Supreme Court, U.S.
FILED
01 323 AUG 21 2001
OFFICE

No.

IN THE

Supreme Court of the United States

ELIZABETH WINKER

Petitioner

v.

BOEING COMPANY, THE

AND

MCDONNELL DOUGLAS CORPORATION

On Petition For Writ Of Certiorari
To The Eight Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Elizabeth Winker
PRO SE
126 Rutherglen
Valley Park, MO 63088

QUESTIONS PRESENTED

IS MENTAL ILLNESS A VALID DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT (ADA)?

DOES MENTAL ILLNESS FALL UNDER THE REHABILITATION ACT?

SHOULD A LITIGATE BE PUNISHED FOR COUNSELS INCOMPETENCE?

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT

Elizabeth Winker, Plaintiff and appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in this proceeding in case No. 00-1821 of that court on March 08, 2000, affirming the rulings in the United States District Court for the Eastern District of Missouri.

OPINION BELOW

The judgement of United States Court of Appeals Eight Circuit supporting the Judgement of the District Court is reported at App.1. The decision denying rehearing en blanc is reported at App.2. The decision of the United States District Court Eastern District Missouri Eastern Division to dismiss Counts I, III, and IV is reported at App. 3. The decision of the United States District Court Eastern District Missouri Eastern Division ruling Count II in favor of the Defendant is reported at App. 9.

JURISDICTION

The united States Court of Appeals for the Eighth Circuit entered its judgment on April 3, 2001. Petitioner timely filed a Petition fo Rehearing, which the Eighth Circuit denied [UNPUBLISHED], on April 6, 2001 United Sates Court of Appeals for the Eighth Circuit petitioner timely filed for rehearing en banc also denied May 23, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States

Constitution provides Exclusionary rule; no person can be deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

Petitioner Elizabeth Winker seeks damages from McDonnell Douglas Boeing company for WRONGFUL DISCHARGE Petitioner was employed on March 17, 1986 as a sheet metal assembler for McDonnell Douglas. She was diagnosed October 26, 1992 for Bi-Polar Manic Depressive Illness. July 1994 she signed a paper at medical first aid bldg. 4 stating she is a person with a handicap. The company was well aware the petitioner was mentally ill.
Spring of 1995 she was assigned to a supervisor who is called the(TERMINATOR). Loren Hodge tortured and harassed petitioner and called her a "nut." Hodge also wanted her to work a job without proper paper work and the ok to work from the Government. On December 4, 1995 Ms. Winker was discharged for attendance.

Miss Winker took her claim with the aid Mr. Scott Levine, Esq to the United States District Court Eastern District Missouri. Winker asked the court for damages under Americans with Disabilities Act, 42 U.S.C.ƒ 12101 et seq. (Count I) The Rehabilitation Act 29 U.S.C. ƒ794 (Count II), The Missouri Human Rights Act, Mo. Rev. Stat. Ch. 213 (Count III), and the Labor Management Relations Act, 19 U.S.C. ƒ185. Counts I, III, and IV were dismissed as untimely as Mr. Levine was delinquent in filing. Count II was awarded to the Defendant in a Summary Judgement. The case was appealed in full to the Eight Circuit Court of Appeals. The ruling of the lower court was upheld.

REASONS FOR GRANTING WRIT

Ms. Winker was instructed not to seek consul by her union during the arbitration that lasted from December 4, 1995 to February 11, 1997. When the arbitration was canceled Ms. Winker sought the aid of Mr. Mike Barrett, Esq. Mr. Barrett informed Ms. Winker of the EEOC for the first time. Ms. Winker immediately contacted the EEOC. As Mr. Barrett's practice does not encompass civil law, the Petitioner hired Mr. Levine on February 24, 1997 with a down payment of five thousand dollars for immediate action. Winker's complaint was filed with EEOC on February 25, 1997. The EEOC granted her a right to sue in early June. Mr. Levine then failed to file suit until September 8, 1997. Her claim under Counts I and III were delinquent from the time of her termination, so equitable tolling would be critical for these Counts to be valid. Judge Jean C. Hamilton of the District court whose ruling was upheld in appellate court did not grant equitable tolling, dismissing these Counts as Mr. Levine failed to notify the court of Ms. Winkers ignorance of the EEOC. This ignorance of " vital information bearing on the existence of [her] claim"*Chakonas v. City of Chicago,* 42 F.3d 1132, 1135-37 (7th Cir. 1994) is a suitable reason for the granting equitable tolling.

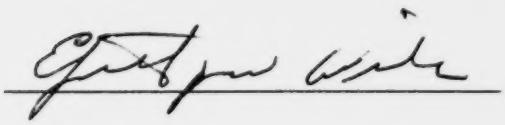
Count IV was also dismissed as the September 8, 1997 filing date was past the six months from the violation in February 1997. Ms. Winker hired Mr. Levine on February 24, 1997 for immediate action on this charge. The negligence was fully on Mr. Levine's side.

Count II was ruled in the Defendants favor as Justice Rodney W. Sippel in the district court said that she was unable to preform her job due to her attendance record. Judge Sippel took as fact the defendants attendance figure of 238 of the past 356 days. Mathematically it is imposible for

Ms. Winker to have missed more than 205 days even if every day in her five month leave of absence was counted and partial days counted as full. But by company rules the petitioner she only had four absences. Many of these absences were caused by stress from discrimination by her supervisor.

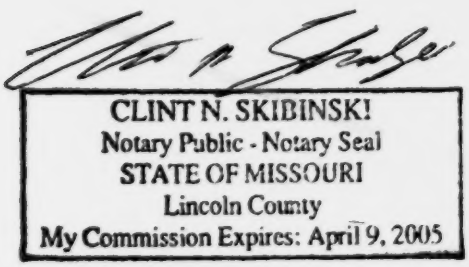
CONCLUSION

Respectfully Submitted,



Elizabeth Winker
PRO SE
126 Rutherglen
Valley Park, MO 63088

On this date of August 21, 2001.



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Rec. 6/1/01 UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
CA

No. 00-1821	* 4:97CV1862RWS
Elizabeth Winker,	* Appeal from the United
Appellant,	States
	* District Court for the
v.	* Eastern District of
The Boeing Company,	Missouri
Defendant,	*
McDonnell Douglas	*
Corporation,	*
Appellee.	*

Judgement

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.
(5172-010199)

April 6, 2001
MANDATE ISSUED
MAY 31 2001
A true copy.

ATTEST: s/Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHT CIRCUIT.

App. 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1821	*
Elizabeth Winker,	*
Appellant,	*
	*
v.	*
McDonnell Douglas Corporation,	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellee.	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.
Judge Morris S. Arnold took no part in the consideration or decision of this case.
(5128-010199)

May 23, 2001

Order Entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Filed May 20. 1998
ELIZABETH WINKER,) U.S. DISTRICT COURT
plaintiff(s),)EASTERN DISTRICT OF.MO
)
vs.)Case No.4:97CV01862 GPG
THE BOEING COMPANY)
and)
MCDONNELL DOUGLAS CORP.,)
)
Defendant(s))

MEMORANDUM AND ORDER

This matter is before the Court on defendants Boeing and McDonnell Douglas' joint motion to dismiss.
plaintiff Elizabeth Winker filed this action on September 8, 1997. She alleges that defendants unlawfully discriminated against her when they refused to accommodate her disability and when they terminated her. She brings this claim pursuant to the Americans with Disabilities Act, 42 U.S.C. S 12101 etseg. (ADA) (Count I), the Federal Rehabilitation Act of 1973, 29 U.S.C. 5 706 et seq. (Count~II); and the Missouri Human Rights Act, Mo. Rev. Stat. 5 213.010 et seq. (MHRA) (Count III). Plaintiff also claims that defendants' acts violated the terms of a collective bargaining agreement. She therefore brings a claim pursuant to 5 301 of the Labor Management Relations Act, 19 U.S.C. 5 185 (124RA) (Count IV).

I. Relevant Background
According to the complaint and plaintiff's affidavit, the relevant facts are as follows Plaintiff suffers from bipolar, manic depression, which caused her to take periodic medical leaves between October and December 1993. During that period, she requested defendant McDonnell Douglas adhere to her medical
restrictions. McDonnell Douglas terminated plaintiff on

December 4, 1995. Plaintiff contacted her union, which filed a grievance on her behalf. plaintiff claims that her union representative told her that she could not pursue a claim with the Equal Employment Opportunity Commission (EEOC) until the completion of the grievance process. In early or late February 1997, plaintiff learned the union would not take her case to arbitration. She filed a complaint with the EEOC at that time and received a right to sue letter in early June 1997. She filed this action on September 8, 1997.

II. Discussion

Because the parties have attached affidavits to their pleadings, the Court will treat defendants' motion as one for summary judgment.

Summary judgment shall be entered if the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247-48 (1986); Matsushita Elec Indus. Co. v Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In ruling on a motion for summary judgment, this Court views the evidence and all reasonable inferences which may drawn therefrom in the light most favorable to the nonmoving party. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 775 (8th Cir. 1995). In response to a properly supported motion, the nonmoving party must set forth specific facts, by affidavit or other evidence, which demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita 475 U.S. at 586.

A. ADA Claims

Defendants first argue that plaintiff's failure to file an EEOC charge within 300 days bars her ADA claim.

Plaintiff alleges she was terminated December 4, 1995. She filed an intake questionnaire with EEOC on February 25, 1997, 449 days after her termination. Accordingly, defendants argue that plaintiff's ADA claim is barred because she failed to file an EEOC charge within 300 days of the adverse personnel action. Plaintiff concedes she filed her charge out of time, but argues for equitable tolling.

Under the ADA, a plaintiff must file an EEOC charge within 180 days after the date of the "alleged unlawful practice.u Because Missouri also has a law prohibiting disability-based discrimination, a plaintiff has 300 days from the date of the allegedly discriminatory action to file an EEOC charge. See Conner v. Reckitt & Colan. Inc., 84 F.3d 1100, 1104 (8th Cir. 1996). The timely filing of a charge of discrimination with the EEOC is not a jurisdictional prerequisite to an action under the ADA, but is rather akin to a statute of limitations and is subject to waiver, estoppel and equitable tolling. Zii,es V. Trans World Airlines. ~ 455 U.S. 385, 393 (1982); Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1327 (8th Cir. 1995). If a plaintiff fails to file

1plaintiff claims that she filed a charge with EEOC at this time as well, and that e'due to internal EEOC processing errors and delays beyond Plaintiff's control,~ the complaint was not filed until June 3, 1997. Because either date is well past the 300 day requirement for filing an EEOC charge1 the Court need not resolve this question.

a timely charge, her action is barred unless she can demonstrate that the limitations period is subject to equitable modification. Drlng, 58 F.3d at 1327.

"Equitable tolling is appropriate when the plaintiff, despite,~ all due diligence, is unable to obtain vital information beering on the existence of his claime" Dring, 58 F.3d at 1328 (quoting Chakonas v City of Chicago~ 42 F.3d 1132, 1135-37 (7th Cir. 1994)). Equitable tolling does not require any misconduct by the defendant. Dring, at 1328; ~ee also Anderson V. Unisy~ Corp~, 47 F.3d 302, 306-07 (8th Cir. 1995) (stating that equitable tolling is premised on plaintiff's excusable neglect, which may or may not be attributable to defendant), cert. denied, 516 U.S. 913 (1995). "To determine whether a plaintiff in fact lacked vital information, a court should ask whether a reasonable person in the plaintiff's position would have been aware that he had been fired in possible violation of the (ADA]." Drjflg, 58 F.3d at 1329 (quoting Chakonas, 42 F.3d at 1135).

Plaintiff's sole basis for invoking equitable tolling is that her union representative told her that she had to complete the grievance process before she could file an EEOC charge. Following this advice, she waited until after its conclusion before filing the charge. Negligent advice of counsel is not

sufficient to invoke equitable tolling. Gilbert ex rel. Gilbert V. Secretary of Health & Human Servs., 51 F.3d 254, 257 (Fed. Cir. 1995). Plaintiff's pursuit of her grievance indicates she was aware her termination possibly violated the ADA. The Court sees no reason why the negligent advice of a union representative should excuse plaintiff from exercising due diligence. The Court will dismiss Count I of the complaint. For the same reasons, plaintiff's MHRA is untimely. Mo. Rev. Stat. S 213.075. The Court will dismiss Count III of the complaint.

B.
Rehabilitation Act
Defendants next argue that the statute of limitations bars Count II of the complaint. The Rehabilitation Act lacks a statute of limitations. When a federal civil rights statute does not impose its own statute of limitations, courts borrow the statute of limitations from the applicable state governing personal injury suits. See Cheeney v. Highland Community College, 15 F.3d 79, 81-82 (7th Cir. 1994); see also Wilson v. Garcia, 471 U.S. 261 (1985). Accordingly, for the purposes of plaintiff's claims under the Rehabilitation Act, Missouri's five year personal injury statute of limitations applies. Cheeney, 15 F.3d at~81; Mo. Rev. Stat. 5 516.120; see also Holmes V. Texas A & M University, 138 F.3d 168 (5th Cir. 1998); Southernland v. Hardaway Mgt.. Inc., 41 F.3d 250(6th Cir. 1994); Bates V. Long Island R.R., 997 F.2d 1028 (2nd Cir. 1993), cert. denied, 510 U.S. 992 (1993); Baker v. Board of Regents, 991 F.2d 628 (10th Cir. 1993). Plaintiff filed this action within five years of her dismissal. Accordingly, her Rehabilitation Act claim is timely.
Defendants next argue that even if timely, her claims brought pursuant to section 504 of the Rehabilitation Act are not sustainable. The Court disagrees.
Section 504 of the Rehabilitation Act addresses nondiscrimination under federal grants and programs:

> No otherwise qualified individual with a disability in the United States ... shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> 29 U.S.C. S 794(a).

The Act defines "program or activity" as all of the operations of:

(A)an entire operation, partnership or other private organization, or an entire sole proprietorship--

(I)if assistance is extended to such corporation, partnership, or other private organization, or sole proprietorship as a whole; or

(ii)which is principally engaged in the business of providing educational health care, housing, social services, or parks and recreation; or

(B)the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship... any part of which is extended Federal financial assistance.

29 U S.C. 5 794(b)(3)(A) & (B).

Defendants have filed an affidavit from Sandra L. Parker, a litigatibn administrator. Parker attests that plaintiff only worked on procurement contracts and did not work on programs subsidized by the government or programs that received Federal financial assistance. This 'affidavit, however, does not address the question of whether the facility or facilities in which plaintiff worked received a subsidy or assistance. Defendants have not, therefore, provided evidence to support it~ motion on the Rehabilitation Act claim. The Court believes additional discovery will resolve this question, and defendants are free to file another motion for summary judgment when they have accumulated the evidence necessary to support one.

C. LMRA

Defendants next move to dismiss Count IV of the complaint, which is brought pursuant to section 301 of the LMRA. Defendants argue that this claim, like the others, was filed out of time.

In a suit for breach of a collective bargaining agreement which does not involve a provision to submit disputes to arbitration,

state contract law provides the applicable limitations period. DelCostello V- Teamsters, 462 U.S. 151 (1983). The matter differs where the collective bargaining agreement contains an arbitration provision, as here. Here, plaintiff cannot bring her claim for breach of the collective bargaining agreement without also alleging that the union failed to fairly represent her, regardless of whether she sues the employer, the union, or both. Chauffeurs. Teamsters & Helpers V. Terry, 494 U.S. 558, 564 (1990) (citing DelCostello, at 164-165). As such, the claim is a hybrid one, subject to the six month limitations period contained in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). DelCostello, at 169.
The facts are that plaintiff's claim accrued in late February 1997, when she learned her grievance was denied. This action was filed September 8, 1997, more than six months later. Count IV is therefore untimely and is dismissed.

III. Conclusion
For the reasons given above, the Court finds that plaintiff's ADA, MHRA, LMRA claims are untimely, and therefore they are dismissed. However, given the limited evidence before it, the

Court will deny defendants' motion to dismiss plaintiff's Rehabilitation Act claim.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss is GRANTED in part and DENIED in part.
IT IS FURTHER ORDERED that Counts I, II & IV of plaintiff's complaint are dismissed.
Dated this 20 day of May, 1998.

S/Jean C. Hamilton

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ELIZABETH WINKER,)
Plaintiff(s),) No. 4:97CV1862 RWS
) Filed
V.) JAN 12 2000
) U.S. DISTRICT COURT
MCDONNELL DOUGLAS CORP.,) E. DISTRICT OF MO.
Defendant(s).) ST. LOUIS

MEMORANDUM AND ORDER

This matter is before the Court on Defendant McDonnell Douglas Corp.'s (McDonnell Douglas") Motion for Summary Judgment. Plaintiff, Elizabeth Winker, claims that McDonnell Douglas terminated her employment at McDonnell Douglas because Winker 5uffers from bi-polar disorder. Winker claims that her termination violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794'. Summary Judgment will be granted to McDonnell Douglas because Winker cannot establish that she was able to perform the essential functions of her position at McDonnell Douglas when she was terminated. In order to prevail on a claim under Section 504 of the Rehabilitation Act, a plaintiff must show, among other things, that she is able to perform the essential functions of the job from which she was terminated.

1 Winker's Complaint also stated claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.

the Missouri Human Rights Act Mo. Rev. Stat. §213.010 et seq. and the Labor Management Relations Act, 19 U.S.C. § 165. These claims were dismissed by the Court on May 20, 1998. Only Winker's claim under the Rehabilitation Act remains before the Court for consideration on defendant's Motion for Summary Judgment.

Background

Winker began working for McDonnell Douglas in March1986. She was employed as a sheet metal worker on the F-15, F-18 and Harrier jet projects.
Winker suffers from bi-polar disorder. This disorder is a mental illness that causes Winker to experience severe manic and depressive states. The disorder also causes suicidal tendencies. Further, Winker does not have normal sleep/wake cycles. She remains awake for days at a time after which she sleeps for days at a time.
As a result of her illness, Winker missed numerous days of work. She was first terminated in 3uly 1994 for failing to return from an extended leave of absence. Winker was reinstated. At Winker's request, and in an effort to accommodate her illness, Winker was moved from first to second shift.
Winker's absences continued after her reinstatement. From November 1994 through June 1995, Winker missed twenty-five full days of work and twelve partial days of work. In addition, from 3une 1995 through December 1995, Winker was on a leave of absence due to her illness.
During her final year of employment at McDonnell Douglas, Winker was absent 238 days.
McDonnell Douglas has a no-fault attendance policy. This policy provides for progressive discipline against covered

employees. The policy provides that after a specified number of days absent, employees are first given one oral warning, followed by three written warnings and finally, termination. Winker was a covered employee under the no-fault attendance policy. Winker received the warnings set forth in the attendance policy including the third written warning. Winker was terminated from her position on December 20,1995. McDonnell Douglas informed Winker that she was being terminated due to excessive absenteeism. Winker applied for disability benefits from the Social Security Administration in October 1993, prior to her termination from McDonnell Douglas. In her application, Winker stated that she became unable to work In 1991. Winker began receiving disability benefits in 1994. Winker. has not been employed since leaving McDonnell Douglas. She testified that she is unable to work currently because of her condition.

Legal Analysis

A. Standard of Review

When considering a motion for summary judgment, the Court must determine whether the record, when viewed in the light most favorable to the non-moving party, shows any genuine Issue o~ material fact. Fed. R. Civ. P.56(c). See generally, Celotex Corp. v. Catrett 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby. Inc. 477 U.S. 242, 249-50(1966). A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record, which it believes demonstrate the absence of a genuine Issue of material fact. Celotex 477 U.S. at 323. There is, however, no express or implied requirement in Rule 56 that the moving party must support its motion with affidavits or

other materials negating the opponent's claim. Id. The burden is not on the moving party to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Id. at 325. Instead, the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Ld. As long as the record before the court demonstrates that there is no genuine issue of material fact, summary judgment should be granted. Id. at 323.

When faced with a motion for summary judgment meeting the standard set forth above, the non-moving party may not rest upon the mere allegations or denials of its pleadings alone, but must introduce affidavits, depositions, answers to interrogatories, or admissions on file designating specific facts showing that there is a genuine issue of material fact for trial. Celotex 477 U.S. at 324; Jetton V. McDonnell Douglas. Corn. 121 F.3d 423, 427 (8th Cir. 1997); Noli V. Petrovskv, 828 F.2d 461, 462 (6th Cir. 1987). Further, a plaintiff facing a motion for summary judgment must designate specific facts showing a genuine issue of material fact on each essential element of his claim. Id.

B. Winker's Rehabilitation Act Claim

The Rehabilitation Act provides that no otherwise qualified individual with a disability shall be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). The act applies to employers who receive federal financial assistance. Winker asserts that she can make a claim under the Rehabilitation Act because some of McDonnell

Douglas' program receives federal funding. McDonnell Douglas concedes that some of its programs receive federal financial assistance. But, McDonnell Douglas contends that the Rehabilitation Act does not cover Winker's claim because she was not employed by a program that received federal financial assistance. It is unnecessary for the Court to determine whether Winker's claim is covered by the Rehabilitation Act because even if the Act did apply, Winker cannot establish a prima facie case for the claim. To state a prima facie claim under the Rehabilitation Act, Winker must show:

1) she Is a person with a disability as defined by the statute; 2) she is otherwise qualified for the job from which she was terminated; and 3) she was terminated due solely to discrimination based upon her disability. See, Randolph v. Rodgers 170 F.2d 850,858(8"' Cir. 1999); Amir v. St. Louis University 184 F.3d 1017, 1029 n.5 (8"' Cir.1999).

The parties do not contest that Winker is disabled under the Rehabiliation Act. Therefore, the Court begins its analysis of Winker's claim by determining if Winker Is qualified for the position she held before her termination. The Court uses a two-step analysis to determine whether the plaintiff is qualified for the sought after employment. Browning v. Liberty Mutual Ins. Co., 176 F.3d 1043, 1047 (8th Cir. 1999). First, the Court determines whether the plaintiff has the requisite skills, education, certification or experience necessary for the job. Id. Second, the Court determines whether the plaintiff can, despite her impairments, perform the essential functions of the job either with or without reasonable accommodation. Id.

Winker cannot satisfy both steps of the qualification analysis. There is no question that Winker has the requisite skills to perform the job of sheet metal worker at McDonnell Douglas. Winker could not however perform all

of the essential functions of her job because she was absent a large part of the time. Winker missed 238 of her last 365 days of employment with McDonnell Douglas. The record establishes that Winker's absenteeism was chronic and ongoing.

Winker argues that attendance at work was not an essential function of her job. She argues that there is no indication that her absenteeism affected the timeliness of the projects on which she worked. Therefore, Winker argues her attendance was not an essential function of her job.

Winker's argument misses the point. It Is axiomatic that in order to be able to perform all of the essential functions of a job, the worker must at the very least be able to show up for the work. Browning, 178 F.3d at 1046. "An employee who is 'unable to come to work on a regular basis [is] unable to satisfy any of the functions of the job In question, much less the essential ones." Moore v. Payless Shoe Source. Inc., 187 F3d. 845, 848 (8th Cir. 1999). Attendance is an essential function of any job including Winker's. That essential function may, however, be modified to accommodate a plaintiff's disability. For instance, If work can be done off-site, then attendance on-site may not be essential, an accommodation of off-site work might be possible. If the work must be done at the company's site however, then the worker must be able to show up for the work there. An employer is not required to change the essential nature of the job In order to accommodate an individual's special needs. Mole v. Buckhorn Rubber Products. Inc. 165 F.3d 1212, 1218 (8th Cir. 1999). "An employer is not required to hire additional employees or redistribute essential functions to other employees" when making an accommodation. Winker did not a have job that could accommodate an inability to be present at the workplace. Winker's job involved manufacturing aircraft. Winker could not perform

her work from home or from a satellite office. Winker's job as a sheet metal worker had to be done on site. The record establishes that Winker could not be present on site with any regularity. Attendance on site was an essential function of Winker's job that could not be accommodated. Winker was unable to perform all essential functions of her job. This determination, that Winker was unable to perform the essential functions of her job, is supported by Winker's sworn statement in her application for disability benefits. In that application Winker affirmatively stated that she was unable to work as early as 1991. Prior sworn statements of Inability to work will justify. summary judgment in a subsequent claim under the Rehabilitation Act, unless the plaintiff comes forward with an explanation sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without reasonable accommodations." Moore v. Payless Shoe Source. Inc. 187 F.3d 845, 847 (8th Cir. 1999) (quoting Cleveland v. Policy Management Systems Corn. 526 U.S. 795(1999)). Winker has not come forward with any explanation that would support a finding that at the time she was terminated she was able to perform the essential functions of her job. Attendance on site at McDonnell Douglas' facility was an essential part of Winker's job. Winker could not attend regularly and McDonnell Douglas could not move her work off-site. Winker was not "qualified" for employment as that term is defined by the Rehabilitation Act.

Because Winker cannot establish that she was qualified to receive the benefits she seeks in her Rehabilitation. Act claim, her claim must fall. It is unnecessary to analyze Winker's Rehabilitation Act claim any further.

Accordingly,
IT IS HEREBY ORDERED that defendant's Motion for Summary Judgment is GRANTED. The remaining claim against defendant is dismissed.

An appropriate Judgment will accompany this Order.

s/Rodney W. Sippel
Rodney W. Sippel
UNITED STATES DISTRICT JUDGE

Dated this 12th day of January, 2000.

Supreme Court, U.S.
FILED
SEP 24 200
CLERK

No. 01-323

In The

Supreme Court of the United States

ELIZABETH WINKER,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT J. TOMASO
Counsel of Record

RANDALL S. THOMPSON
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street
24th Floor
St. Louis, Missouri 63101
(314) 345-6000

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

Winker, a former union employee of McDonnell Douglas Corporation ("MDC") was discharged from MDC on December 4, 1995 due to excessive absenteeism and in accordance with the terms of a collective bargaining agreement ("CBA"). Winker maintains that MDC discharged her due to her bi-polar condition, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12101 *et seq.*, 29 U.S.C. §794(a) (the "Rehab Act"), the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. Ch. 213, and Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.[1]

Winker began working for MDC on March 17, 1986 as a member of the International Association of Machinists and Aerospace Workers, District Lodge 837 ("Union"). Winker worked as a sheet metal worker on the F-15, F-18, and the Harrier programs.

Winker's bi-polar condition causes her to experience alternating but severe manic and depressive states. For example, Winker admits that suicidal tendencies are not uncommon for her. Winker acknowledged that her bi-polar condition causes significant swings in her physical state as well:

- "Because of my illness you stay up for three days, sleep a day, up for five days, sleep for two days."

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[1] Winker originally also asserted her claims against MDC's parent company, The Boeing Company. Those claims were dismissed and are not at issue here.

- "It's like being a veteran that is disabled in a wheelchair or someone with arthritis. You know that some days you are going to feel good and other days that arthritis is just going to kill you. And some days you know you are going to be okay living in a wheelchair and other days you're going to say, oh, I wish I would have never went to Vietnam. Like I told you today, I'm manicky. Tomorrow I could be depressed and be laying on the couch all day. I don't know. You don't know what you're going to be from one day to the next."

- "I don't know if I can show up for a job. I don't know if I can work 40 hours a week. I don't know anything. I don't trust myself."

As a result, Winker is unable to function normally for long periods of time. She admits that medications do not improve her condition and that she cannot even predict her condition from one day to the next. Winker's treating physicians do not believe she can work, and they feel Winker's condition will only deteriorate. Winker, in fact, has not worked in any substantial capacity since leaving MDC in 1995.

Even as early as 1993, while still working for MDC, Winker applied for disability benefits from the Social Security Administration. In her application for disability benefits, Winker asserted her inability to work since September of 1993. Winker began receiving benefits in 1994.

Not surprisingly in light of her severe bi-polar condition, Winker had an exceedingly poor attendance record during much of her employment at MDC. In her final

year of employment alone, Winker was absent approximately 238 days, or 65% of that year:

Date of Absence	Type of Absence
11/21/94	Full Day
12/05/94	Partial
12/06/94	Partial
12/12/94	Full Day
12/13/94	Full Day
12/14/94	Partial
01/04/95	Partial
01/06/95	Partial
01/11/95	Full Day
01/12/95	Full Day
01/13/95	Full Day
01/16/95	Full Day
01/19/95	Full Day
01/23/95	Full Day
01/24/95	Full Day
01/27/95	Full Day
02/01/95	Partial
02/07/95	Full Day
04/08/95	Partial
04/19/95	Partial
04/24/95	Partial
05/08/95	Partial
05/15/95	Full Day
05/23/95	Partial
05/24/95	9-Day Leave of Absence
06/09/95	Full Day
06/10/95	Full Day
06/14/95	Partial
06/17/95	Full Day
06/19/95	5-Month Leave of Absence

This undisputed absenteeism caused Winker's eventual discharge.[2]

As a union member, Winker was subject to the CBA between MDC and the Union, including a no-fault attendance policy with progressive discipline for unexcused absences:

Total cumulative Days Absent	Action
3	Oral Warning (Record of Unsatisfactory Performance or "RUP")
5	First Written Warning (Employee Incident Report or "EIR")
7	Second Written Warning (EIR)
9	Third (*Final*) Written Warning (EIR)
10	Up to and Including Discharge

By June 1995 Winker was placed on "final warning" status due to her absences.[3] Two days after receiving her final warning, Winker was absent from work on June 14,

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[2] Notably, MDC tried to assist Winker and accommodate her in many ways. After she was discharged for failing to return to work following an extended leave of absence in July 1994, MDC reinstated Winker. MDC also granted a request by Winker in early 1995 to switch from first to second shift, which Winker believed better suited her bi-polar condition. MDC personnel also referred Plaintiff to MDC's Employee Assistance Program on several occasions.

[3] For purposes of the attendance policy, absences are counted during a twelve-month period beginning on the employee's anniversary date. Winker's anniversary date at the time was January 9. In addition, medical leave of absence counted as only one-day's absence under MDC's attendance policy.

1995, did not work the following Saturday, June 17, 1995 (a scheduled work day for Winker), then began a leave of absence the next Monday, June 17, 1995, which lasted for over five months. Winker did not return to MDC until December 4, 1995.

Pursuant to its attendance policy, MDC discharged Winker, effective upon her return in December 1995, which allowed Winker to retain insurance coverage throughout that five-month period when she did not work. Winker filed a grievance with her union regarding her discharge, but the Union withdrew the grievance as unsustainable.

In June 1997, approximately eighteen months after her discharge, Winker first filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), claiming discrimination and harassment on the bases of sex and disability. Winker filed this lawsuit on September 19, 1997.

The United States District Court for the Eastern District of Missouri dismissed Winker's MHRA and ADA claims as untimely. In a dual-filing state such as Missouri, in order to bring suit under the ADA, an individual must, among other requirements, file a charge of discrimination with the EEOC within 300 days of the alleged unlawful adverse action. *See Conner v. Reckitt & Colan, Inc.*, 84 F.3d 1100, 1104 (8th Cir. 1996). The time limit for filing under the MHRA is 180 days. Mo. Rev. Stat. §213.075.

Likewise, the District Court dismissed Winker's LMRA claim for failure to file suit within the LMRA's applicable six-month statute of limitation. *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983).

The District Court later granted summary judgment to MDC as to Winker's remaining Rehab Act claim, finding that Winker was not a qualified individual with a disability in light of her absenteeism and inability to work.

On appeal the United States Court of Appeals for the Eighth Circuit affirmed the District Court's rulings. The Eighth Circuit also denied motions by Winker to introduce additional evidence, for reconsideration, and for rehearing *en banc*.[4]

SUMMARY OF THE ARGUMENT

This Court should deny Winker's petition for a writ of certiorari. The lower courts properly dismissed Winker's claims. Moreover, Winker's petition does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, this case would involve matters applicable and relevant only to the parties in this case. Accordingly, Winker's petition should be denied.

Essentially, Winker claims that the lower courts should have applied equitable tolling to resurrect her ADA, MHRA and LMRA claims because she was unaware of administrative exhaustion requirements,

[4] Winker was represented by counsel throughout the proceedings in the District Court. Winker parted with counsel immediately after the Eighth Circuit's initial affirmance of the District Court's dismissal and remains *pro se*.

which she primarily attributes to her then-attorney's negligence, as well as to erroneous advice from her union representative. As for her Rehab Act claim, Winker merely disputes the District Court's computation of her absenteeism. These arguments are not sufficient grounds for granting Winker a writ of certiorari.

Winker's contention that the District Court should have applied equitable tolling to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari. An alleged misapplication of law will generally not support a writ of certiorari. Supreme Court Rule 10. Further, Winker's assertions that she was ignorant of the EEOC's procedures (particularly due to alleged attorney negligence and poor advice from her union representative), and that such purported ignorance is the reason for her untimely charge of discrimination, are factually incorrect. Winker's position is also legally incorrect; a litigant cannot invoke equitable tolling based upon her attorney or union representative's negligence.

Winker's contention that the District Court also improperly failed to apply equitable tolling to resurrect her untimely LMRA claim fails for similar reasons. Negligence of counsel cannot support a claim of equitable tolling under the LMRA.

Finally, Winker's contention that the District Court erred in ruling that she was not a qualified individual for purposes of her Rehab Act claim due to her excessive absenteeism is also not a proper basis to grant a writ of certiorari. Not only is an alleged factual mistake insufficient to grant Winker's petition, but she is the one who is factually mistaken. The District Court did not err in its

factual account of Winker's absenteeism. Further, even if imperfectly computed, Winker's absenteeism was unequivocally excessive and, as a matter of law, it rendered her unqualified for her position and unable to sustain a claim of discrimination.

Accordingly, for each of these reasons Winker's petition for a writ of certiorari should be denied.

ARGUMENT

Winker's petition for a writ of certiorari should be denied. Supreme Court Rule 10 states that "only for compelling reasons" will a writ of certiorari be granted and sets forth such reasons. Winker's petition does not set forth any of the reasons outlined in Rule 10. It also fails to present any compelling reasons justifying a writ of certiorari.

Winker appears to offer three reasons in her petition seeking a writ of certiorari: (1) the District Court improperly failed to apply the doctrine of equitable tolling to her untimely ADA and MHRA claims; (2) the District Court also should have applied equitable tolling to her untimely LMRA claim; and (3) the District Court incorrectly found that Winker was not qualified for her position (for purposes of her Rehab Act claim) due to her excessive absenteeism. Winker's contentions are not sufficient grounds, either individually or cumulatively, to grant her a writ of certiorari.

1. Winker's contention that the District Court should have invoked equitable tolling as to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari.

Winker's contention that the District Court should have invoked equitable tolling as to her untimely ADA and MHRA claims is not a sufficient ground for granting a writ of certiorari. Specifically, Winker asserts that at the time of her discharge she was "ignoran[t] of the EEOC" and thus did not file a timely charge of discrimination. Winker petition at 4. Additionally, Winker asserts that her counsel at the time improperly failed to apprise the District Court of her prior ignorance of the EEOC (*i.e.*, attorney negligence), which she also contends constitutes sufficient grounds for applying equitable tolling. *Id.*

Winker's contentions fail to support her petition for at least three reasons. First, Winker's assertion in itself is insufficient to support a writ of certiorari. At most, Winker contends that the District Court misconstrued (or was not sufficiently presented) the facts and also misapplied the law. Supreme Court Rule 10 specifically states that the Court will "rarely" grant a petition for a writ of certiorari in such circumstances. There are no otherwise compelling circumstances in this case warranting detour from that edict. For this reason alone, Winker's petition should be denied.

Second, Winker's assertion that she was, in fact, ignorant of the EEOC's procedures, and that such purported ignorance is the reason for her untimely charge of discrimination, is factually incorrect. Winker previously admitted before the District Court that she did not file a

timely charge of discrimination following her discharge strictly because her union representative instructed her not to do so until her grievance was resolved. *See* Memorandum of Law in Support of Plaintiff's Response to Defendants' Joint Motion to Dismiss, at 7-8; Winker affidavit, dated December 9, 1997, attached to Memorandum of Law in Support of Plaintiff's Response to Defendants' Joint Motion to Dismiss, at ¶¶ 8-9. Winker's failure to act was not due to purported ignorance of the EEOC or its processes, but was due to advice she had received from her union.

Winker followed her union representative's advice to await resolution of her grievance, after which she immediately attempted to assert her claim to the EEOC: "After learning that my grievance proceedings had been exhausted, I immediately proceeded to the EEOC and filed my complaint against my employer." *Id.* at ¶ 11. Thus, Winker has stated neither adequate nor correct facts to sustain her petition for a writ of certiorari.[5]

Third, Winker's contention that the District Court should have excused the untimeliness of her ADA and MHRA claims due to attorney or union representative negligence is legally insufficient. As the District Court properly held, a litigant cannot invoke equitable tolling based upon her counsel's negligence. *Gilbert ex rel. Gilbert*

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[5] Ironically, in the case cited by Winker in her petition, *Chakonas v. City of Chicago*, 42 F.3d 1132 (7th Cir. 1994), the court specifically held that equitable tolling was ***not*** applicable to the plaintiff's untimely discrimination claim, as the plaintiff was found to have been aware of the existence of a possible claim of discrimination but did not act timely upon the matter. *Id.* at 1135-36. Winker's allegations are quite similar to those in *Chakonas*.

v. Secretary of Health & Human Servs., 51 F.3d 254, 257 (Fed. Cir. 1995). Accordingly, Winker's petition should be denied.[6]

2. Winker's contention that the District Court should have invoked equitable tolling as to her untimely LMRA claim is also an insufficient basis for granting a writ of certiorari.

Winker's contention that the District Court also improperly failed to apply equitable tolling to resurrect her untimely LMRA claim is not a sufficient ground to grant a writ of certiorari. Winker claims that her attorney negligently allowed the applicable six-month statute of limitations period to expire, rendering her LMRA claim untimely. Accordingly, Winker contends that the District Court should have applied equitable tolling. Winker's argument is not sufficient grounds for granting her petition for a writ of certiorari.

Winker's argument in this regard again merely disputes the lower courts' application of a correctly-stated

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[6] In addition, unlike under the ADA, a timely-filed charge of discrimination is a jurisdictional prerequisite for maintenance of an MHRA claim. *Hill v. St. Louis University*, 123 F.3d 1114, 1121, 1118 (8th Cir. 1997); *Tapp v. St. Louis University*, 78 F. Supp.2d 1002, 1011 (E.D. Mo. 2000). Therefore, Winker could not invoke equitable tolling regarding her Missouri state law claim under any circumstances.

Moreover, even if considering the merits, Winker's ADA and Missouri's state law MHRA claims would still fail. Just as the District Court properly found that Winker was not qualified for her position for purposes of the Rehab Act, the same finding precludes Winker's ADA and MHRA claims, which utilize a similar analytical scheme and burden of proof.

rule of law, which does not constitute a compelling reason justifying a writ of certiorari. S. Ct. Rule 10.

Furthermore, the District Court correctly declined to invoke equitable tolling regarding Winker's LMRA claim. As stated above, application of equitable tolling cannot be based upon the negligence of the petitioning party's counsel. *Gilbert*, 51 F.3d at 257. Therefore, Winker's petition should be denied.

3. Finally, Winker's contention that the District Court erred in ruling that she was not a qualified individual for purposes of her Rehab Act claim due to her excessive absenteeism is not sufficient to grant a writ of certiorari and is factually and legally incorrect.

Finally, Winker contends that the District Court erred in ruling that due to her excessive absenteeism she was not a qualified individual for purposes of her Rehab Act claim. Even if true, this is not a proper basis to grant a writ of certiorari. Moreover, the allegation is also factually and legally incorrect. Winker contends that the District Court incorrectly calculated her total absences (238 days in her final year of employment as opposed to 205 days in that time) and that the District Court incorrectly determined her number of absences under the applicable company rules. Winker petition at 4-5. Once more, Winker's contention is no more than a dispute with the lower court's interpretation of MDC's policy, which is not a sufficient basis for granting a writ of certiorari. S. Ct. Rule 10.

In addition, as with her other contentions, Winker's allegation regarding her absenteeism is factually incorrect. The District Court correctly calculated that Winker

was unavailable for work 238 days in the last year of her employment with MDC.

Even assuming Winker's calculations were accurate – that she was available for work a total 205 days, not 238 days, in her final year of employment – the District Court's conclusion that she was unqualified due to her level of absenteeism would still be appropriate. As a matter of law, an individual absent 205 of 365 days is not "qualified" for her position. *See, e.g., Moore v. Payless Shoe Source, Inc.*, 187 F.3d 845, 848 (8th Cir. 1999); and *Browning v. Liberty Mutual Ins. Co.*, 176 F.3d 1043, 1046 (8th Cir. 1999).

Moreover, Winker does not (and cannot) dispute the other facts demonstrating her lack of qualification for her position:

(i) Winker receives disability benefits in connection with which she has conceded an inability to work in any capacity;

(ii) Winker has not worked meaningfully since leaving MDC nearly six years ago;

(iii) Winker's treating physicians indicated that she cannot work regularly and that her condition will only deteriorate;

(iv) Winker has admitted that she cannot work for extended periods, has suicidal tendencies, and cannot predict her physical and mental condition from one day to the next.

Simply put, Winker is not qualified for her position, and the District Court properly granted MDC summary judgment. Winker's petition is without merit, and granting her petition for a writ of certiorari would not result in

a different outcome. Therefore, Winker's petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, McDonnell Douglas Corporation respectfully requests that this Court deny Petitioner Elizabeth Winker's Petition for a Writ of Certiorari.

Respectfully submitted,

BLACKWELL SANDERS PEPER MARTIN LLP

ROBERT J. TOMASO
RANDALL S. THOMPSON
720 Olive Street, 24th Floor
St. Louis, MO 63101
(314) 345-6000

Attorneys for Respondent

Supreme Court, U.S.
FILED
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THE CLERK

(3)

No. 01-323

IN THE

Supreme Court of the United States

ELIZABETH WINKER
Petitioner

v.

BOEING COMPANY, THE
AND
MCDONNELL DOUGLAS CORPORATION

On Petition For Writ Of Certiorari
To The Eight Circuit Court of Appeals

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Elizabeth Winker
PRO SE
126 Rutherglen
Valley Park, MO 63088

RP

STATEMENT

Ms. Winker hired Counsel Mr. Levine on February 24, 1997. He was paid $20,000 and Ms. Winker received no results. Mr. Levine and I had an agreement for Legal Services / Review Claims regarding Americans with Disabilities Act and wrongful discharge and pursue settlement. The Lawyer was hired through the Bar Association referral service. This date is significant because the charge questionnaire was received by and stamped received February 26, 1997 by the EEOC. Ms. Winker's Counsel was employed to defend Ms. Winker. Instead he allowed many errors and misrepresented here and abused her and the rules of the court. Petitioner is pro se. District Court Judge Rodney. W. Sippel, under his analysis of review he states in his Memorandum and order "Burden of proof. No genuine issue of material fact, summary judgement should be granted. Must introduce affidavits, depositions, admissions, specific facts, and material fact for trial. Further, a plaintiff facing a motion for Summary judgement must designate specific fact showing a genuine issue of material fact on each essential element of this claim".

Ms. Winker felt her Counsel was delinquent, negligent and abusive. Ms. Winker's Counsel granted lack of evidence. There was no evidence of Ms. Winker's condition getting worse. Petitioner's Doctors: Psychiatrist, Psychologist and Primary Care Physician, which Petitioner does not see anymore, did not come forth with depositions or affidavits for facts for trial.

When Petitioner was terminated the Union Business Representative, Stephen Bruske introduced these statement and Facts: During my investigation, it became clear that Ms. Winker could have been and was a productive employee if left alone and not harassed. Witnesses attesting to this statement: 7 Employees.

Per Mr. Bruske:
Many more individuals wanted to give testimony on her behalf. This point was well taken and thus documented.

During the investigation, it became apparent that the apathetic behavior of Supervisor Loren Hodge towards Ms. Winker was appalling. Not only should MDC condemn this type of action, but let the record show, the Union strongly protests any and all types of this action by Supervision towards our union members. Had the Union been made aware of this at the time, a Grievance would definitely have been filed on behalf of Ms. Winker. During the 1st Step Hearing, Mr. Hodge denied making any derogatory statements about Ms. Winker, but the Union has contradictory testimony, that he did in fact refer to Ms. Winker as a nut.

In conclusion, the Union's position is that Ms. Winker should be reinstated, with no loss of time or benefits and she should be treated as any other employee with obvious disabilities.

Mr. Bruske retired before the arbitration was cancelled on February 11, 1997. The new Business Representative cancelled arbitration on February 11, 1997. The EEOC stamped received February 26, 1997, the charge questionnaire that was sent to Ms. Winker and filled out. On these 11 pages to the EEOC, it states that the company and the Union discriminated against her. Ms. Winker claimed discrimination and did not claim or allege harassment on the bases of sex. The questionnaire also asked if assistance was sought, Name of Source Assistance Mike Barrett, Mr. Barrett's Affidavit dated October 03, 2001 states:
Ms. Elizabeth Winker called my office regarding her discharge form McDonnell Douglas Corporation. I

advised Ms. Winker that I did not handle employment law cases, but that she should contact the EEOC (equal employment opportunity commission) to file a report against her former employer. It was my impression that Ms. Winker was unaware of what the EEOC was at the time of our telephone conversation on or about February 20, 1997.

Clearly Petitioner's case had genuine issues, facts, affidavits and depositions.

Affidavit of Richard J. Wickham, a secretary for McDonnell Douglas executed on November 11, 1997, states (#7) McDonnell Douglas Corporation is capable of satisfying any judgement against it for the purported discrimination alleged in Elizabeth Winker's lawsuit.

Sandra Parker executed two Affidavits December 1997 and November 1999 with conflicting information. Her position at McDonnell Douglas was Litigation Administrator.

Raymond D. Farrari executed two Affidavits November 1998 and November 1999 with conflicting information. His position was controller of Military Aircraft and Missile Systems (MAMS).

Raymond D. Farrari executed a thirty-two-page deposition. Page 18 question presented to him: "So the tools are owned by the United States government?" Mr. Farrari answered "Yes, they are."

Loren Hodge, who terminated Ms. Winker wrongfully, executed a deposition on October 22, 1999 proving his leadership, conflicts with his training.

Paul Homan, who was laid off, executed an affidavit. His position was co-worker Union employee. He states (#11)

that the existence of Ms. Winker's mental illness was known throughout the building.
"I recall Ms. Winker's supervisor, Loren Hodge having knowledge of this fact."
"I recall witnessing on a number of occasions, both before and after Ms. Winker was terminated, Mr. Hodge proclaimed to fellow supervisors and co-workers that Ms. Winker was "a nut" and "nuts".
"I am also aware that the company attendance policy was not uniformly applied and that supervisors exercised broad discretion in its application: For Example, I heard a former co-worker Tony Smaltz, proclaim that he had missed sixty-four (64) days without receiving discipline. I heard him boast that he set a record for the most absences without discipline."
Mr. Homan also states that Ms. Winker was able to perform her job at a very high level of competence. Homan states most of the tools had labels which stated "property of the U. S. Navy".

Petitioner has a sworn statement by her father, Ewald Winker, dated April 18, 2001. He states (#10) Scott Levine dismissed Boeing Co. as a party defendant May 11, 1998. Elizabeth did not concur with Mr. Levine's decision.

Deposition (39 pages) of the witness, who is now retired, Mary Lou Shed was on behalf of plaintiff and states she also, suffers from depression. She testified that the supervisor picked on Ms. Winker, He was aware of Petitioners mental illness. She states she missed work because of her illness and when she found out he was going to be her supervisor, they called him the "terminator" and to watch herself because he like to fire people. Ms. Shed states that Hodge rode Ms. Winker quite a bit. She also states that she herself had an attendance problem and it was overlooked. She testified that out at Boeing, attendance is based on a who-you-

know basis. Attendance is not a mechanical process. She knows people with many EIRS, up to five (5) in their folder, and supervisors exercise discipline at their own discretion. She also testifies tools were property of the US Navy and the Government owns the tools. She admits that the night before her deposition on Ms. Winker's behalf, the defendant called her on her phone before her testimony. Also, she states that she knows a lot of employees were really upset about Ms. Winker getting fired on a sick leave. She admits that she, herself, had enough absenteeism to get terminated. Because of her record, she was concerned that she was getting Loren Hodge, "the terminator" for a supervisor. She also states that she was probably lucky that she didn't get fired and had gotten written up three (3) times.

There is also testimony on behalf of Ms. Winker from Mrs. Linda Ferder in October 2001. Mrs. Ferder, who started employment in January 1975, was installed in the Union in May of 1975. She was a Shop Steward 1979-1984, plant chairman for Union Business Representative April 1991 through 1996. She ran for president of the Union in 1996 and lost by 23 votes. She then went back to the shop in 1997 and is presently working in factory as a sheet metal worker. She will testify she knows many workers who missed a lot of time but did not get fired. The Company attendance policy is not in accordance with the terms of a collective bargaining agreement (CBU). The Union never agreed to be part of the company no fault attendance policy and that it is an unfair practice (dispaired attendance policy) it depends who you are. The company did not follow their own policy. They discriminated. For example, Bob Schafer told witnesses that a supervisor wrote up Rich Healy for attendance. At the same time, in the same department, he never wrote up Lois Caffle who was Mrs. Ferder states was late to work 85% of the year for three (3) years. She did not clock in, instead the supervisor wrote her time in and witnesses

complained. There is a No-fault attendance policy that the Union does not agree with. Mrs. Ferder, as an arbitrator, reinstated workers that should never have been terminated. Judge Sippel states Ms. Winker was terminated in July 1994. That is false. Ms. Winker was terminated October 11, 1993 through July 11, 1994. Ms. Winker was hospitalized for mental illness October 11, 1993. She could not have taken sick leaves from October 1993 to December 1993 because she had been terminated during that time.

Mrs. Ferder testifies that Ms. Winker was written out of context of the Company no-fault attendance policy for excused and unexcused absences. She actually received three (3) written warnings (EIRs) before her first oral warning (Record of Unsatisfactory Performance or "RUP").

Mrs. Ferder testifies that Ms. Winker was not on Social Security prior to her first termination October 11, 1993. Ms. Winker went to the Social Security on October 22, 1993 after first termination and started receiving Social Security benefits before she was reinstated back to her job on July 11, 1994. She received a seven-month trial work period under Title 7 Social Security.

Mrs. Ferder and Company labor representative agreed to reinstate Ms. Winker on July 11, 1994, due to extenuating circumstances due to her mental illness. At the time of Ms. Winker's termination Mrs. Ferder's name was Linda Golleher and it is now Linda Ferder. Elizabeth Winker did not miss 238 days her last year of employment. Mrs. Ferder admits that if Ms. Winker's arbitration would have not cancelled and if due process had occurred she would have her job back.

As an employee of McDonnell Douglas, Elizabeth worked on planes that were owned by the U.S.

government (F18 Blue Angels). Ms. Winker did wing repair. Her previous supervisor gave favorable appraisals of her work. "Employee does very good on work quality. Is outstanding in her work output, work habits, work interest, resourcefulness and gets along well with everyone. Employee is truly an asset to her department".

Ms. Winker is not seeing previous doctors. Her psychologist, Dr. Patricia Shaw, Ph.D. is being investigated for Medicare fraud, overcharging Ms. Winker. There is a pamphlet that shows Dr. Shaw supports MAPS. MAPS supports financially and otherwise, the use of psychedelics and marijuana through science. Dr. Shaw leaned toward the defendant and in no way supported Ms. Winker to regain her employment. Previous psychiatrist, Dr. Ahmad Ardekani responded the same way.

Ms. Winker's psychiatrist, Dr. Winston Kitchen, 950 Francis Pl Suite 204, St. Louis, MO 63105, states in a letter for the Court:
"I am the treating psychiatrist for Ms. Winker. Her diagnosis is bipolar disorder. She has responded fairly well to mediation treatment and regular office visits. I do believe she is competent to participate in courtroom proceedings. However, she may need special accommodations such as very careful listening to her arguments so that she is not misunderstood. In addition, court rulings or decisions should be very carefully explained to her so that she does not misunderstand them."

CONCLUSION

Defendants admit to the Eighth circuit EDSL that by company rules Ms. Winker only technically missed 21 days. They admit this on their opposition of Ms. Winker

wanting to supplement to the record. Actually out of those 21 days Ms. Winker had six (6) sick days and ten (10) vacation days. This means that the petitioner missed only 5 days according to the no-fault attendance policy that the union had no part of.

The Defendants were careless in their briefs to the Eighth Circuit. The Eighth Circuit did not reject Ms. Winker.

By Missouri Corporation law, McDonnell Douglas merged with Boeing and took on all obligations from McDonnell Douglas at time of merger.

Entered here is an order under rule 27B(a) from the United States Court of appeals for the Eighth Circuit form the clerk Michael Gans on November 21, 2000. It states: The motion of Scott D. Levine for leave to withdraw as counsel of record for Elizabeth Winker is granted. Ms. Winker's motion for permission to supplement the record will be taken with the case for consideration by the panel to which the case is submitted for disposition on the merits. The clerk is directed to transmit a copy of Ms. Winker's motion to Appellee's attorney of record.

Respectfully submitted,
PRO SE
Elizabeth J. Winker
926 Rutherglen
Valley Park, Mo. 63088
(636) 225-1131